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THE PUBLIC INTEREST LITIGANT IN CALIFORNIA: OBSERVATIONS ON TAXPAYERS' ACTIONS

by Ronald K. L. Collins*

&

Robert M. Myers**

I. INTRODUCTION

In recent years there has occurred a proliferation of public interest lawsuits.¹ Under the rubric of taxpayers' suits, private attorney general actions, or public interest litigation,² the judicial process has been frequently resorted to in order to vindicate important commonly shared rights in such areas as civil liberties and civil rights, environmental conservation, administrative regulation, consumer protection, tax assessments, and municipal affairs. Together with state initiatives, referendums, recall measures, public hearings, and public record acts, public interest lawsuits serve to ensure more meaningful and democratic participation in the governmental decision-making process. At the same time they afford the public an opportunity to correct governmental abuses that might otherwise go unchecked. It is more than a trite saying to declare that given the modern course of events these kinds of actions are one of the more effective forms of therapeutic devices genuinely available to public-minded citizens wishing to cure those ills which plague the body politic.

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1. Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301 & n.1 (1973) [hereinafter cited as Nussbaum].

2. Public interest litigation has been described as that kind of lawsuit which "is brought by private plaintiffs in the hope of achieving broader results by litigating issues of . . . current importance which when resolved will affect substantial numbers of people." *Id.* at 305. For the definitional characteristics of the aforementioned description, see *id.* at 304-05; Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976). Since the above characteristics are common to private attorney general, taxpayers', and public in-

The restrictive posture of federal common law doctrines has had a substantial chilling effect on the filing of taxpayers' lawsuits. As will be discussed, the rules governing "standing" and the recovery of attorneys' fees render the federal forum all but hostile to public interest litigants. Given that sentiment, this article will examine the effective scope of such suits at the state level as a viable alternative to taxpayer litigants. In conjunction with that aim, the article's primary focus will be on those problematic areas likely to impede the successful effectuation of public interest lawsuits.

II. TAXPAYER STANDING AND RELATED MATTERS

Archimedes is reported to have once said: "Give me a place to stand . . . and I can move the earth."³ Indeed, there is an element of legal truth that can be extrapolated from the prophetic words of this ancient Greek mathematician. Certainly, in the area of taxpayers' suits,⁴ cases such as *Frothingham v. Mellon*⁵ and *United States v. Richardson*,⁶ among others,⁷ evidence the legal importance of having sufficient grounds for standing to sue. Traditional article III justiciability limitations⁸ requiring a plaintiff to have a personal stake in the outcome of the controversy have regularly been applied by the Supreme Court to bar federal taxpayers' suits.⁹ Even under the more liberal *Flast v. Cohen*¹⁰

terest suits, the terms, although they may be technically distinguishable, will, for the purposes of this article, be used interchangeably unless otherwise specifically designated.

3. 11 GREAT BOOKS OF THE WESTERN WORLD 399 (R.M. Hutchins ed. 1952).

4. A description of taxpayers' suits can be found in 18 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 52.02-.03a (3d ed. 1949) [hereinafter cited as McQUILLIN]; see text accompanying notes 25 & 28 *infra*. For a broad analysis of taxpayers' suits, see McQUILLIN, *supra*, §§ 52.01-.52; Comment, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895 (1960) [hereinafter cited as *Taxpayers' Suits*]. A definitive treatment of the federal taxpayer question can be found in Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Note, *Citizen Organizations Intervening in Federal Administrative Proceedings: The Lingering Issue of Standing*, 51 B.U.L. REV. 403 (1971); Note, *Taxpayer Standing to Litigate*, 61 GEO. L.J. 747 (1973).

5. 262 U.S. 447 (1923).

6. 418 U.S. 166 (1974).

7. See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *Doremus v. Board of Educ.*, 342 U.S. 429 (1952).

8. See *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

9. See *United States v. Richardson*, 418 U.S. 166, 192-94 (1974) (Powell, J., concurring); cf. *Flast v. Cohen*, 392 U.S. 83, 94-97 (1968).

10. 392 U.S. 83 (1968).

"two-tier nexus test,"¹¹ taxpayers' access to the federal courthouse has continued to be quite limited.¹² The net result is that the slow, cumbersome, and sometimes unresponsive electoral process remains the only realistic federal forum available to taxpayers to check legislative and executive abuses.¹³

Despite the continued reluctance of federal courts to permit taxpayers to bring suits in the public interest, "[s]uch challenges by state taxpayers are, however, now allowed in some three-fourths of the states."¹⁴ And while state taxpayers' suits against *state* governmental actions are accorded less judicial favor than those maintained against *municipal* governmental actions,¹⁵ it is evident that the philosophy of these several

11. Chief Justice Warren, writing for the majority, outlined the test as follows:

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

Id. at 102-03. For a worthwhile analysis of the *Flast* holding, see K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 22.09-09-7 (Supp. 1970); Note, *Taxpayer Standing to Litigate*, 61 GEO. L.J. 747, 750-65 (1973).

12. See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 235-38 (1974) (Brennan, J., dissenting); *United States v. Richardson*, 418 U.S. 166, 197-202 (1974) (Douglas, J., dissenting); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 236-43 (1974).

13. See *United States v. Richardson*, 418 U.S. 166, 179 (1974); cf. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 233-34 (1974) (Douglas, J., dissenting). Moreover,

[t]he need for taxpayers' suits arises from the absence of alternative means of correcting illegal practices of government officials which would otherwise be irreparable. One alternative to taxpayers' suits is, of course, the elective process itself, but the electorate may ignore corruption, illegality, or unconstitutionality which occurred early in the term or which is relatively less eye-catching than the overall record of those in power; elections present package alternatives, often only two in number, and the voters are disabled from expressing their views on each governmental act.

Taxpayers' Suits, *supra* note 4, at 910 (footnote omitted). Ironically enough, several years ago the Supreme Court noted that "under the conditions of modern government, litigation may well be the sole practicable avenue . . . to petition for redress of grievances." *NAACP v. Button*, 371 U.S. 415, 430 (1963). See Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 231 (1936).

14. B. SCHWARTZ, ADMINISTRATIVE LAW 461 (1976) [hereinafter cited as SCHWARTZ]. See *Flast v. Cohen*, 392 U.S. 83, 108-09 nn.2-4 (1968) (Douglas, J., concurring); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.09, at 245-46 (1958); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.10, at 759-62 (Supp. 1970); *Taxpayers' Suits*, *supra* note 4, at 895-96 & n.7.

15. See SCHWARTZ, *supra* note 14, at 461.

states is "based upon [a] rejection of the *Frothingham* reasoning."¹⁶ This liberal attitude of the states hinges on three fundamental propositions. First, "the nominal nature of the individual taxpayer's interest is held not to rule out his standing."¹⁷ Second, the state courts reject the notion that any possible flooding of the court dockets constitutes sufficient cause to ban taxpayers' actions.¹⁸ Third, the legislatures of the various states have seen fit to encourage the free challenge of illegal governmental action. As Professor Schwartz aptly points out:

To the state judges, of greater importance has been the need to ensure that invalid public action will not be rendered immune from attack. In the state view, the taxpayer, both as such and as a member of a society grounded upon the rule of law, is intimately concerned with the validity of action taken by the government which his tax dollars support.¹⁹

The combined effect of these three tenets of the states' general scheme has been to place another sword for checking governmental abuse in the otherwise meager arsenal of the citizen taxpayer.²⁰ By contrast to the federal forum, there is a plenitude of "standing" room in the state courthouses for taxpayers.

A. Policy Basis For Taxpayers' Actions In California

As far back as 1858 the California Supreme Court established the right of a citizen taxpayer to challenge the validity of local government spending practices.²¹ By 1909, the state legislature had codified the right of such plaintiffs.²² Today that provision, section 526a of the Code of Civil Procedure, provides in part:

16. *Id.*

17. *Id.* (footnote omitted). See *Wirin v. Parker*, 48 Cal. 2d 890, 894, 313 P.2d 844, 846 (1957); *Wirin v. Horrall*, 85 Cal. App. 2d 497, 504-06, 193 P.2d 470, 474-75 (1948).

18. See SCHWARTZ, *supra* note 14, at 462. In this respect Professor Kenneth Culp Davis notes:

If any special evils flow from the extreme liberality of these state courts on the problem of standing, the evils are not apparent in the reported opinions. The courts are not flooded by cases brought by officious intermeddlers, and no sign appears that the adversary system has been either destroyed or impaired.

3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 22.10, at 254 (1958) (footnote omitted). See Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 470-71 (1970).

19. SCHWARTZ, *supra* note 14, at 462 (footnote omitted).

20. One commentator has observed:

Such litigation allows the courts, within the framework of traditional notions of "standing," to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts.

Taxpayers' Suits, *supra* note 4, at 904.

21. *Foster v. Coleman*, 10 Cal. 278, 281 (1858); *accord*, *Winn v. Shaw*, 87 Cal. 631, 637, 25 P. 968, 969 (1891).

22. Law of March 20, 1909, ch. 348, § 1, [1909] Cal. Stat. 578.

An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.²³

Section 526a reflects the "very liberal" attitude of California courts in permitting taxpayers to bring suits on behalf of the public in order to prevent illegal governmental conduct.²⁴ More importantly, as a unanimous court in *Blair v. Pitchess*²⁵ declared:

The primary purpose of this statute . . . is to "enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement."²⁶

The state line of cases holds that "the principles of justiciability in taxpayers' suits under section 526a differ fundamentally from the restrictive federal doctrine . . ."²⁷ That difference applies to taxpayers' suits grounded in common law doctrines²⁸ as well as to those arising under section 526a. The distinction between common law and statutory causes of action is important in that one form of action may offer a broader remedial basis than another. When a court decides to invoke a more liberal interpretation of the applicable taxpayer statutes, such a court may well be availing itself of its independent powers under the

23. The remainder of section 526a states:

This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities.

An action brought pursuant to this section to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

CAL. CODE CIV. PRO. § 526a (West Supp. 1976). See Note, *California Taxpayers' Suits: Suing State Officers Under Section 526a of the Code of Civil Procedure*, 28 HASTINGS L.J. 477 (1977).

24. See *Blair v. Pitchess*, 5 Cal. 3d 258, 268, 486 P.2d 1242, 1249, 96 Cal. Rptr. 42, 49 (1971); *Crowe v. Boyle*, 184 Cal. 117, 152, 193 P. 111, 125 (1920).

25. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

26. *Id.* at 267-68, 486 P.2d at 1248-49, 96 Cal. Rptr. at 48-49, quoting *Taxpayers' Suits*, *supra*, note 4, at 904. Recently the California Supreme Court has reaffirmed that position in *White v. Davis*, 13 Cal. 3d 757, 763-65, 533 P.2d 222, 225-27, 120 Cal. Rptr. 94, 97-99 (1975).

27. *White v. Davis*, 13 Cal. 3d 757, 764, 533 P.2d 222, 227, 120 Cal. Rptr. 94, 99 (1975).

28. See *Harman v. City & County of San Francisco*, 7 Cal. 3d 150, 159-161, 496 P.2d 1248, 1254-55, 101 Cal. Rptr. 880, 886-87 (1972); cases cited note 21 *supra*.

precedents established at common law. In part, the practice can be attributed to the conviction, long subscribed to in California, that public interest litigation ought to be encouraged. For over a century the state attitude has always been to encourage the private attorney general "[b]ecause [when] the *motive* of a plaintiff-taxpayer is viewed as irrelevant, taxpayers' suits afford a means of mobilizing the self-interest of individuals within the body politic to challenge legislative programs, prevent illegality, and avoid corruption."²⁹

B. *Who Qualifies As A Taxpayer Plaintiff?*

Section 526a expressly confers standing upon four different classes of litigants: (1) upon a citizen resident who is "assessed" a tax; (2) upon a corporation which is "assessed" a tax; (3) upon a citizen resident who "has paid a tax;" or (4) upon a corporation which "has paid a tax." Separate and apart from any corporate status, a literal interpretation of section 526a would indicate that a taxpayer plaintiff must be a citizen *resident* in order to establish standing. However, the California Supreme Court in *Irwin v. City of Manhattan Beach*³⁰ held that a literal interpretation of the code is not only improper but also violates equal protection guarantees:

We would consider these arguments [requiring local residence] eminently persuasive if it were not for the fact that [such a] reading of section 526a . . . violates the equal protection clause of the Fourteenth Amendment. No reason has been presented to us, *or conceived by us*, which would render less than arbitrary and capricious a distinction which would give a nonresident corporate taxpayer the right to maintain a suit such as here contemplated, but would deny the same right to a nonresident taxpayer who is a natural person.³¹

Significantly, the *Irwin* court extended the scope of section 526a to encompass nonresident taxpayers even though the section expressly precluded such an interpretation. Nevertheless, one fortuitous factual aspect of the *Irwin* case might be interpreted as a limitation on the court's holding. While the plaintiff in *Irwin* was not a resident taxpayer, she was a *property* owner and had paid taxes levied against her

29. *Taxpayers' Suits*, *supra* note 4, at 904 (emphasis added and footnote omitted). See *Mock v. City of Santa Rosa*, 126 Cal. 330, 58 P. 826 (1899); McQUILLIN, *supra* note 4, at 21-22. In keeping with this general policy, the state has enacted the Public Records Act. CAL. GOV'T CODE ANN. §§ 6250-61 (West Supp. 1976).

30. 65 Cal. 2d 13, 415 P.2d 769, 51 Cal. Rptr. 881 (1966).

31. *Id.* at 19, 415 P.2d at 772-73, 51 Cal. Rptr. at 884-85 (emphasis added and omitted).

property by the city.³² That factor could thus alter *Irwin's* holding to a *sub silentio* rule requiring property ownership whenever the taxpayer plaintiff is not a citizen resident. While the *Irwin* court did not utter a single word which would justify the notion that property taxpayers are to be given special treatment, the plaintiff's status in that case remains potentially significant.

However, such a property ownership requirement is at odds with the logic of *Irwin*. The court's holding in *Irwin* turns on the single principle that nonresident individuals should be treated no differently than nonresident corporations. Certainly, the *Irwin* holding does not restrict standing to those natural persons who are nonresident property owners. The statute on its face requires no such ownership status. To adopt the argument that an individual must be a real property owner within a given city or county, while a nonresident corporation need not be, would perpetuate the same equal protection violation invalidated in *Irwin*. Moreover, it would prove equally discriminatory as against nonresident lessees who may not own property. So understood, any interpretation which would condition section 526a standing upon an arbitrary property ownership requirement would clash with the very rationale applied in *Irwin*.³³

Under the terms of section 526a, corporate plaintiffs, whether domestic or foreign, need not be residents so long as they have been "assessed" a tax or have in fact paid a tax to the particular county, town, or city "within one year before the commencement of the action." These same conditions apply equally to resident individuals. An assessed tax necessarily implies a tax assessment against local *property*. Plaintiffs, either corporate or citizen, asserting standing on such grounds would most likely have to be property owners in the general locale of the government whose conduct is being challenged. *Irwin* expands section 526a by abolishing the requirement that a property owner also be a resident.

Additionally, the code, as modified by *Irwin*, grants automatic standing to all corporate or individual plaintiffs who have paid a tax. Since the statute does not specify the *kind* of tax here required, the statutory

32. *Id.* at 18-19, 415 P.2d at 772-73, 51 Cal. Rptr. at 884-85. See also *Gamble v. City of San Diego*, 79 F. 487 (9th Cir. 1897); *Taxpayers' Suits*, *supra* note 4, at 910.

33. A nonresident corporation which paid a sales tax within a given city, town, or county would, by the express terms of the statute, have a right to sue since it has "paid a tax therein." Moreover, a nonresident, nonproperty owner plaintiff may just as easily form a close corporation which would, after paying a sales tax, have standing to sue under the statute. Nothing in California law, however, requires an earnest taxpayer litigant to embark on such a charade.

language should be construed to include the payment of all forms of taxes, such as license, gasoline, cigarette, sales, utility, and various business or city income taxes.³⁴ Moreover, section 526a requires only that a tax be paid to the treasury of a city, county or town therein generally, thereby precluding any necessity for tracing the tax paid to the action on which the complaint is based.

At first blush, it may seem ludicrous to permit nonresidents to challenge city or county actions merely because they have paid some nominal tax. But when one recalls the "primary purpose" of state taxpayers' suits,³⁵ it is readily apparent that such criticism is unfounded. The rule in California has always been that "[i]t is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds."³⁶ The essential focus is on the illegal or wasteful nature of the governmental act. It does not matter that the plaintiff has suffered little or no injury as a taxpayer or that the taxpayer is not a resident or local property owner. The only requisite is that the complaining party has paid a tax and on that basis seeks to enjoin certain illegal, wasteful or injurious acts incompatible with the public interest of the citizenry affected. Consequently, the taxpayer's primary interest inheres in the wrongful act committed against the public per se. The various state court holdings which allow for a very liberal application of the rules in taxpayers' suits³⁷ even where the plaintiff is a nonresident,³⁸ or where the amount of the tax paid is de minimis,³⁹ or where there is no showing of special damages to the taxpayer⁴⁰ all lend support to the private attorney general concept of taxpayers' actions.⁴¹

34. In *City of Columbus ex rel. Willits v. Cremean*, 273 N.E.2d 324 (Ohio 1971), the court held that the payment of a city income tax was sufficient to grant the plaintiff standing even though he was a nonresident of the city whose sewer charges he was challenging. *Id.* at 327.

35. See text accompanying notes 26 & 29 *supra*.

36. *Wirin v. Parker*, 48 Cal. 2d 890, 894, 313 P.2d 844, 846 (1957). See *County of Los Angeles v. Superior Court*, 253 Cal. App. 2d 670, 678, 62 Cal. Rptr. 435, 441 (1967); SCHWARTZ, *supra* note 14, at 461; *Taxpayers' Suits*, *supra* note 4, at 905.

37. See note 24 *supra* and accompanying text.

38. See note 31 *supra* and accompanying text.

39. See note 36 *supra* and accompanying text; text accompanying note 67 *infra*.

40. See text accompanying note 70 *infra*.

41. With respect to the residency or property ownership questions, it cannot be accurately maintained that *only* resident or property owner plaintiffs have a real interest in the conduct of any given community's actions or that they are the only ones affected. This is borne out by the very character of modern day city life. In a mobile society like our own, people do not isolate the conduct of their lives to a single locale. It is not uncommon to work in one city, live in another, and seek entertainment in a third city,

C. Who Can Be Named As A Defendant?

The applicable provision of section 526a provides that an action "may be maintained against any officer thereof, or any agent, or other person, acting in [a county, town, or city's] behalf."⁴² On its face, the statute applies only to specific agents or officers of the governmental entity rather than to the entity itself. However, nonrestrictive interpretations by the courts of statutory and common law requirements for taxpayers' suits have permitted plaintiffs to maintain actions against such governmental entities as counties,⁴³ cities,⁴⁴ and municipal agencies.⁴⁵ Likewise, it may also be proper to join public bondholders or contractors as defendants in a taxpayer's action.⁴⁶

The express language of the statute also would appear to preclude its application to state officials who do not fall within the class of enunciated defendants. However, the California appellate courts, in exercising their common law prerogative, have recognized a taxpayer's cause of action against state officials seemingly independent of section 526a's provisions.⁴⁷ Similarly, the court in *Duskin v. San Francisco Redevelopment Agency*⁴⁸ held that a taxpayer's suit could be maintained

while at the same time commuting through a number of other intermediate cities or counties. Consequently, it is not necessarily accurate to picture the acts of one city or county as affecting only its residents or property owners. Consider what would happen if a metropolitan hub like Hollywood, California enacted an ordinance banning *all* cinema theatres or *all* bookstores. Would only the residents or property owners of Hollywood be harmed? See generally *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972); *Hutchinson, Standing to Sue in Public Interest Litigation*, 7 LINCOLN L. REV. 40 (1971); Comment, *Land-Use Control, Externalities, and the Municipal Affairs Doctrine: A Border Conflict*, 8 LOY. L.A.L. REV. 432 (1975).

42. CAL. CODE CIV. PRO. § 526a (West Supp. 1976).

43. *Harman v. City & County of San Francisco*, 7 Cal. 3d 150, 496 P.2d 1248, 101 Cal. Rptr. 880 (1972); *Lundberg v. County of Alameda*, 46 Cal. 2d 644, 298 P.2d 1 (1956); *Advance Medical Diagnostic Laboratories v. County of Los Angeles*, 58 Cal. App. 3d 263, 129 Cal. Rptr. 723 (1976).

44. *Harman v. City & County of San Francisco*, 7 Cal. 3d 150, 496 P.2d 1248, 101 Cal. Rptr. 880 (1972); *Irwin v. City of Manhattan Beach*, 65 Cal. 2d 13, 415 P.2d 769, 51 Cal. Rptr. 881 (1966); *Carl v. City of Los Angeles*, 61 Cal. App. 3d 265, 132 Cal. Rptr. 365 (1976).

45. *Card v. Community Redevelopment Agency*, 61 Cal. App. 3d 570, 131 Cal. Rptr. 153 (1976); see *Smith v. Mount Diablo Unified School Dist.*, 56 Cal. App. 3d 412, 128 Cal. Rptr. 572 (1976).

46. *McQUILLIN*, *supra* note 4, at 87. See *Smith v. Mount Diablo Unified School Dist.*, 56 Cal. App. 3d 412, 128 Cal. Rptr. 572 (1976).

47. *Blair v. Pitchess*, 5 Cal. 3d 258, 268, 486 P.2d 1242, 1249, 96 Cal. Rptr. 42, 49 (1971); *California State Employees' Ass'n v. Williams*, 7 Cal. App. 3d 390, 395, 86 Cal. Rptr. 305, 308 (1970); *Ahlgren v. Carr*, 209 Cal. App. 2d 248, 252-54, 25 Cal. Rptr. 887, 890-91 (1962). See Note, *California Taxpayers' Suits: Suing State Officers Under Section 526a of the Code of Civil Procedure*, 28 HASTINGS L.J. 477 (1977).

48. 31 Cal. App. 3d 769, 107 Cal. Rptr. 667 (1973).

against a state agency where the complaint was not specifically limited to a section 526a cause of action.⁴⁹ These cases illustrate the significance of an independent common law doctrine which the courts will sometimes utilize in addition to or instead of section 526a grounds, in order to encourage the successful litigation of taxpayers' suits.

Somewhat recently the California Court of Appeal in *Gould v. People ex rel. Busch*⁵⁰ ruled that the judiciary is immune from the reach of taxpayers' suits. In an action to enjoin state judges, district and city attorneys, and police officials from prosecuting certain obscenity cases, the *Gould* court first stated:

[T]o hold section 526a applicable to the judges named as defendants in the instant case would undercut the concept of judicial immunity and wash away the very foundation of an independent judiciary.⁵¹

The plaintiffs in *Gould* were disputing the court's judicial authority. Therefore it is reasonable to assume that the rule of *Gould* applies only to the judiciary acting in its *adjudicative* rather than in its *administrative* capacity. This conclusion is supported by the authorities upon which the *Gould* court relied.⁵² Those authorities are grounded in the notion that judges "exercising *judicial* functions"⁵³ or performing their "'judicial acts'"⁵⁴ should be immune from civil actions. That was the situation in *Gould*. But what if a presiding judge of a local superior or municipal court decided to expend funds appropriated to the judiciary for illegal or wasteful administrative purposes such as the purchase of religious decor for the courthouse? Or what if this judge permitted some religious organization to use the court premises on weekends for sectarian purposes? Or if the premises were used for nonpublic purposes? Or if public funds were illegally or wastefully deposited in private coffers? The list is endless. But the point remains that such judicial abuses are clearly *administrative* in character. In these instances there is no sound reason for an absolute ban against taxpayers' suits.⁵⁵

49. *Id.* at 773-74, 107 Cal. Rptr. at 670.

50. 56 Cal. App. 3d 909, 128 Cal. Rptr. 743 (1976).

51. *Id.* at 921, 128 Cal. Rptr. at 750.

52. *See id.* See also cases cited notes 53-54 *infra*.

53. *Caruso v. Abbott*, 133 Cal. App. 2d 304, 308, 284 P.2d 113, 115 (1955) (emphasis added).

54. *Perry v. Meikle*, 102 Cal. App. 2d 602, 605, 228 P.2d 17, 19 (1951) (emphasis added), quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871).

55. Even a separation of powers argument could not ensure total judicial immunity since taxpayers' suits have a common law basis separate and apart from any legislative grant of statutory authority. *See Gould v. People ex rel. Busch*, 56 Cal. App. 3d 909, 921 n.11, 128 Cal. Rptr. 743, 750 n.11 (1976). Moreover, recent case law suggests

The next facet of the *Gould* holding enunciated another reason for barring taxpayers' suits. Ironically, since the plaintiffs had standing to challenge the statutes in question vis-à-vis the criminal actions then pending against them, their case was held not to fall "within the declared purpose of a taxpayer's action under section 526a."⁵⁶ The problem with that aspect of the *Gould* case is that it equates the "primary purpose" rationale of *Blair v. Pitchess*⁵⁷ with the expressed purpose of taxpayers' suits. The *Gould* court invoked the *Blair* rationale to limit the scope of taxpayers' actions despite the fact that the *Blair* dicta was set forth in order to extend the scope of section 526a so that there might exist additional "controls over public officials."⁵⁸ The liberal application of the "standing" rule was fashioned by the *Blair* court to achieve that "remedial purpose."⁵⁹ *Gould* may conflict with the resolve of *Blair* in a situation where a would-be taxpayer plaintiff combines a taxpayer's and a nontaxpayer's cause of action and then avails himself or herself of "standing" grounds based on the nontaxpayer's cause of action. The problem that could arise is that the necessary showing for relief or the scope of the relief sought might well be more confining in the nontaxpayer's action than in the taxpayer's action. *Gould* seems to imply that a plaintiff must pursue the nontaxpayer's action. But to do so might well result in inadequate relief and in the continuation of some illegal or wasteful governmental practice, thereby frustrating the very purpose of taxpayers' suits. For example, an injunction may be obtained in a taxpayer's action without any showing of special damage to the particular plaintiff.⁶⁰ However, injunctive relief might be impossible to achieve in a private civil action where more stringent rules of traditional equitable relief exist. To the extent that the *Gould* rule could obviate the purpose of taxpayers' suits in checking governmental abuses, its rule finds no support in the applicable laws. Simply stated, *Blair* was meant to provide a sword for the taxpayer to attack government abuses more expeditiously rather than to provide a protective shield for the government.

Finally, it is important that the *Gould* court's silence concerning the propriety of taxpayers' suits against local prosecutors and police officials

that the prohibition against suits directed to the judiciary is not an absolute one. See *Board of Supervisors v. Krumm*, 62 Cal. App. 3d 935, 33 Cal. Rptr. 475 (1976) (where the court considered the legality of a municipal judge's power to order the appointment of additional marshal's deputies).

56. 56 Cal. App. 3d at 922, 128 Cal. Rptr. at 750.

57. See text accompanying note 26 *supra*.

58. *Taxpayers' Suits*, *supra* note 4, at 904.

59. 5 Cal. 3d at 268, 486 P.2d at 1249, 96 Cal. Rptr. at 49.

60. See note 70 *infra* and accompanying text.

not be interpreted to mean that this class of public officers also enjoys immunity. California courts have never hesitated to extend the reach of taxpayers' actions to police and prosecutorial officials,⁶¹ particularly when the latter embark upon a common plan or scheme of discriminatory or unconstitutional enforcement of the law.⁶² If suits of this nature were barred, the very bedrock of taxpayers' actions would be shattered.

III. REMEDIES AVAILABLE IN TAXPAYERS' ACTIONS

In order for public interest suits to achieve their socially therapeutic purpose, provision must be made for a broad basis of relief. Otherwise, the perpetration of public wrongs would continue almost unhampered. Depending upon the illegal act committed, the appropriate remedy will require such relief as may be necessary to reimburse the public, punish the wrongful parties, or prevent continuation of the act in question.

A taxpayer seeking to challenge the illegal expenditure of public funds has available a wide range of remedies to ensure governmental compliance with the relevant law. While section 526a is directed to injunctive actions "restraining or preventing" the illegal expenditure of public monies, California courts have sustained taxpayers' actions where the relief sought was mandamus,⁶³ declaratory,⁶⁴ or damages on behalf of the public entity.⁶⁵ The interposition of common law principles in such cases may well have been responsible for producing greater relief than that expressly provided for under section 526a.

In actions to "restrain or prevent" the illegal expenditure of public funds, one need not identify the tax dollars illegally expended. The California Supreme Court has specifically adopted the holding of a lower court that "the mere 'expending [of] the time of . . . [paid officials] in performing illegal and unauthorized acts' constituted an unlawful use of funds which could be enjoined under section 526a."⁶⁶

61. *White v. Davis*, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975); *Wirin v. Parker*, 48 Cal. 2d 890, 313 P.2d 844 (1957); *Carl v. City of Los Angeles*, 61 Cal. App. 3d 265, 132 Cal. Rptr. 365 (1976); *Wirin v. Horrall*, 85 Cal. App. 2d 497, 193 P.2d 470 (1948).

62. See note 61 *supra*. See generally *Murguia v. Municipal Court*, 15 Cal. 3d 286, 540 P.2d 44, 124 Cal. Rptr. 204 (1975); Comment, *Development of the Defense of Discriminatory Prosecution: Murguia v. Municipal Court*, 8 Sw. U.L. Rev. 687 (1976).

63. *Knoff v. City & County of San Francisco*, 1 Cal. App. 3d 184, 81 Cal. Rptr. 683 (1969).

64. *Card v. Community Redevelopment Agency*, 61 Cal. App. 3d 570, 131 Cal. Rptr. 153 (1976).

65. See, e.g., *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976); *Harman v. City & County of San Francisco*, 7 Cal. 3d 150, 496 P.2d 1248, 101 Cal. Rptr. 880 (1972); *Briere v. Mathews*, 202 Cal. 1, 258 P. 939 (1927); *Osburn v. Stone*, 170 Cal. 480, 150 P. 367 (1915).

66. *Blair v. Pitchess*, 5 Cal. 3d 258, 268, 486 P.2d 1242, 1249, 96 Cal. Rptr. 42, 49

Moreover, courts have held that "[i]t is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds."⁶⁷ The rule of these cases squares with the essential purpose of taxpayers' suits—to prevent illegal governmental action. To focus instead on the amount of tax dollars actually expended for such purposes would frustrate the aim of taxpayers' suits.

California courts have not conditioned the granting of permanent injunctive relief in taxpayers' suits upon a showing of traditional equitable requirements.⁶⁸ In *Crowe v. Boyle*,⁶⁹ the California Supreme

(1971), *quoting* *Wirin v. Horall*, 85 Cal. App. 2d 497, 504-05, 193 P.2d 470, 474 (1948). In *Blair*, the court stated:

It appears from the complaint that plaintiffs seek to enjoin defendants, who admittedly are county officials, from expending their own time and the time of other county officials in executing claim and delivery process. If the claim and delivery law is unconstitutional, then county officials may be enjoined from spending their time carrying out its provisions even though by the collection of fees from those invoking the provisional remedy the procedures actually effect a saving of tax funds.

5 Cal. 3d at 269, 486 P.2d at 1249, 96 Cal. Rptr. at 49 (citations omitted).

67. *Wirin v. Parker*, 48 Cal. 2d 890, 894, 313 P.2d 844, 846 (1957); *accord*, *Blair v. Pitchess*, 5 Cal. 3d 258, 269, 486 P.2d 1242, 1249, 96 Cal. Rptr. 42, 49 (1971). Some jurisdictions, unlike California, require that the illegal or unauthorized act actually "result[s] in an increase of . . . [the plaintiff's] taxes or will otherwise result in direct or indirect pecuniary injury" *McQUILLIN*, *supra* note 4, at 25.

68. The issuance of injunctive relief in California is governed by statutory language and judicial decisions. *See* CAL. CIV. CODE § 3422 (West 1970); CAL. CODE CIV. PRO. § 526 (West 1967).

In an action to "restrain or prevent" the illegal expenditure of public funds, the traditional grounds for issuance of injunctive relief would be present in most, if not all, instances. *But see* *Citizens' Comm. for Old Age Pensions v. Board of Supervisors*, 91 Cal. App. 2d 658, 205 P.2d 761 (1949) (declaratory relief inappropriate where taxpayers had cause of action to recover illegally expended public funds). If the illegal conduct were of the nature that an action for damages on behalf of the public treasury would be appropriate, a multiplicity of suits would be required. *See* notes 80-94 *infra* and accompanying text. Moreover, in many instances it would be difficult to measure the damages accurately, thereby precluding compensatory relief. The inability to recover damages leaves injunctive relief as the only remedy to protect public funds.

Since the focus of attention is on the nature of the governmental conduct and on the interests of the taxpayers in general, the unclean hands doctrine, *London v. Marco*, 103 Cal. App. 2d 450, 229 P.2d 401 (1951), should not be applied to the individual taxpayer plaintiff so as to bar injunctive relief. Similarly, neither the equitable public interest test, *Loma Portal Civic Club v. American Airlines*, 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964), nor the relative hardship test, *Christensen v. Tucker*, 114 Cal. App. 2d 554, 250 P.2d 660 (1952), should be invoked to justify the unlawful expenditure of public funds. *See* *Wirin v. Parker*, 48 Cal. 2d 890, 894, 313 P.2d 844, 846 (1957) ("[i]t has been expressly held in this state that expediency cannot justify the denial of an injunction against the expenditure of public funds in violation of . . . constitutional guarantees . . ."). However, the equitable doctrine of laches might well act as a barrier to injunctive relief in some taxpayer actions. *See* *Price v. Sixth Dist. Agric. Ass'n*, 201 Cal. 502, 517, 258 P. 387, 393 (1927).

69. 184 Cal. 117, 193 P. 111 (1920).

Court articulated the applicable standard:

In this state we have been very liberal in the application of the rule permitting taxpayers to bring a suit to prevent the illegal conduct of city officials, and no showing of special damage to the particular taxpayer has been held necessary.⁷⁰

The showing required for taxpayer injunctive relief is minimal in order to further section 526a's primary purpose of "giv[ing] a large body of citizens standing to challenge governmental actions."⁷¹ Observing that "[i]t is elementary that public officials must themselves obey the law,"⁷² the California Supreme Court has declared that section 526a "provide[s] a general citizen remedy for controlling illegal governmental activity."⁷³

To date no California court has specifically articulated the showing necessary for a preliminary injunction to issue in a taxpayer's action. The traditional test for preliminary injunctive relief generally, *i.e.*, the balancing of the equities of the parties,⁷⁴ has been set forth in numerous

70. *Id.* at 152, 193 P. at 125.

71. *Blair v. Pitchess*, 5 Cal. 3d 258, 269, 486 P.2d 1242, 1250, 96 Cal. Rptr. 42, 50 (1971).

72. *Wirin v. Parker*, 48 Cal. 2d 890, 894, 313 P.2d 844, 846 (1957). One of the classic statements of this proposition can be found in the majority opinion of *Mapp v. Ohio*, 367 U.S. 643 (1961), wherein the Court stated: "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Id.* at 659. See *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

73. *White v. Davis*, 13 Cal. 3d 757, 763, 533 P.2d 222, 226, 120 Cal. Rptr. 94, 98 (1975).

74. On the balancing test, the court has said:

"The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him." . . . The general purpose of such an injunction is the preservation of the status quo until a final determination of the merits of the action. . . . Thus, the court examines all of the material before it in order to consider "whether or not a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it; . . ." . . . In making that determination the court will consider the probability of the plaintiff's ultimately prevailing in the case and, it has been said, will deny a preliminary injunction unless there is a reasonable probability that plaintiff will be successful in the assertion of his rights. . . . "In the last analysis the trial court must determine which party is the more likely to be injured by the exercise of its discretion . . . and it must be exercised in favor of that party . . ."

Continental Baking Co. v. Katz, 68 Cal. 2d 512, 528, 439 P.2d 889, 899, 67 Cal. Rptr. 761, 771 (1968) (citations omitted).

75. See *Socialist Workers 1974 Cal. Campaign Comm. v. Brown*, 53 Cal. App. 3d 879, 125 Cal. Rptr. 915 (1975); *California State Univ. v. NCAA*, 47 Cal. App. 3d 533, 121 Cal. Rptr. 85 (1975); *Transcentury Properties, Inc. v. State*, 41 Cal. App. 3d 835, 116 Cal. Rptr. 487 (1974).

cases.⁷⁵ However, application of this test in the context of taxpayers' suits is clearly inappropriate. There is a danger that preliminary injunctive relief might be precluded were the court to "balance the equities" of the parties. Given the representative character of the taxpayer's action⁷⁶ and the fact that "no showing of special damage to the particular taxpayer" need be established for permanent injunctive relief,⁷⁷ balancing of equities should not be done in taxpayers' suits. The policies underlying taxpayers' actions dictate that the plaintiff's probability of success on the merits should be the *only* showing necessary for issuance of a preliminary injunction. Injury to the public can necessarily be presumed both from the illegal expenditure of public funds⁷⁸ and from the very existence of illegal governmental conduct.⁷⁹

In addition to actions to "restrain or prevent" the illegal expenditure of public funds, California decisional law has clearly established the right of a taxpayer to commence an action on behalf of the public treasury to recover funds previously expended illegally. Like the taxpayer's injunctive action, the taxpayer's damages action furthers the sound policies underlying the concept of the taxpayer's action by providing a remedy for illegal governmental conduct already completed. Such actions discourage illegal government conduct since they serve to inform public officials that they may be personally liable for public funds illegally expended.

The justification for the taxpayer's damages action was extensively explored in the early case of *Osburn v. Stone*.⁸⁰ The *Osburn* court, while recognizing that section 526a does not specifically authorize such an action, noted that the statutory language "does not in letter or in spirit forbid a taxpayer from seeking to recover on behalf of his municipality the same moneys if illegally expended."⁸¹ The court, in upholding this type of suit, analogized to the shareholder's derivative action:

76. See note 2 *supra*.

77. *Crowe v. Boyle*, 184 Cal. 117, 152, 193 P. 111, 125 (1920).

78. See *Mines v. Del Valle*, 201 Cal. 273, 280, 257 P. 530, 534 (1927), *disapproved on other grounds*, *Stanson v. Mott*, 17 Cal. 3d 206, 223, 551 P.2d 1, 15, 130 Cal. Rptr. 697, 711 (1976).

79. This latter proposition is especially true in situations where the governmental conduct sought to be enjoined infringes upon constitutionally protected rights. For example, in *Van Nuys Publishing Co. v. City of Thousand Oaks*, 5 Cal. 3d 817, 489 P.2d 809, 97 Cal. Rptr. 777, *cert. denied*, 405 U.S. 1042 (1971), the California Supreme Court, in invalidating an "anti-littering" ordinance on first amendment grounds, commented: "The very presence of the ordinance on the books endangers the free distribution of ideas." *Id.* at 828, 489 P.2d at 816, 97 Cal. Rptr. at 784.

80. 170 Cal. 480, 150 P. 367 (1915).

81. *Id.* at 482, 150 P. at 368.

[T]he necessity to a municipality, whose affairs are in the hands of hostile trustees or councilmen, to recover for illegal expenditures, through the medium of such an action, is quite as great and as imperative as it is in the case of private corporations, and as a stockholder of the latter would have on behalf of his corporation, upon the refusal of its directors to act, the right to maintain such an action, so we think should a taxpayer in the case of a municipality be accorded the same right and power.⁸²

In spite of the comparison to the shareholder's derivative action, the exact contours of the taxpayer's damages action are not well defined. Some general requirements, however, have been repeatedly stated as preconditions to bringing suit. Prior to commencement of the action, demand must first be made upon the governing body or other appropriate official⁸³ to institute the action.⁸⁴ As in a shareholder's derivative action,⁸⁵ the demand requirement has been dispensed with in a taxpayer's suit where it would be of no avail.⁸⁶ Upon subsequent failure to commence suit, the governing body or other appropriate official should be named as a party defendant along with the person who illegally expended the funds.⁸⁷

82. *Id.* at 482-83, 150 P. at 368.

83. In some situations, especially at the state level, the official who illegally expended public funds may not be responsible to a governing board. In such a situation, demand should be made on the public official's superior, the governor, or the attorney general.

84. *Cf.* *Briare v. Mathews*, 202 Cal. 1, 8, 258 P. 939, 942 (1927); *Osburn v. Stone*, 170 Cal. 480, 483, 150 P. 367, 368 (1915); *Mock v. City of Santa Rosa*, 126 Cal. 330, 342, 58 P. 826, 829 (1899); *Newberry v. Evans*, 97 Cal. App. 120, 125, 275 P. 465, 468 (1928). This is the same requirement necessary to commence a shareholder's derivative action in California. CAL. CORP. CODE ANN. § 834(a)(2) (West Supp. 1976). *See* *Starbird v. Lane*, 203 Cal. App. 2d 247, 21 Cal. Rptr. 280 (1962); *Fairchild v. Bank of America*, 192 Cal. App. 2d 252, 13 Cal. Rptr. 491 (1961).

85. *See, e.g.,* *Reed v. Norman*, 152 Cal. App. 2d 892, 314 P.2d 204 (1957); *Gottesfeld v. Richmaid Ice Cream Co.*, 115 Cal. App. 2d 854, 252 P.2d 973 (1953); *Pourroy v. Gardner*, 122 Cal. App. 521, 10 P.2d 815 (1932).

86. *See, e.g.,* *Briare v. Mathews*, 202 Cal. 1, 8, 258 P. 939, 942 (1927); *Moch v. City of Santa Rosa*, 126 Cal. 330, 342, 58 P. 826, 829 (1899); *Newberry v. Evans*, 97 Cal. App. 120, 125, 275 P. 465, 468 (1928).

87. *Osburn v. Stone*, 170 Cal. 480, 482-83, 150 P. 367, 368 (1915); *Silver v. Watson*, 26 Cal. App. 3d 905, 909, 103 Cal. Rptr. 576, 579 (1972). It should be noted that the California Supreme Court, in *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976), upheld, without commenting on the prior demand requirement, a taxpayer's action for recovery of illegally expended tax funds where the facts indicated that the only person joined as defendant was the official who allegedly expended the funds. While *Stanson* calls into question the necessity for demand and joinder, the prudent course is to follow the cases which have specifically passed upon these issues. In addition to ensuring a properly stated cause of action, these requirements serve important functions. The demand requirement, by alerting the government to the illegal expenditures by public officials, may obviate the need for taxpayer action by spurring

Whether or not the taxpayer has an absolute right to bring the action upon failure of the government to act has been an issue causing much concern. In matters of corporate law, a shareholder may not bring a derivative action when the board of directors, acting reasonably and in good faith, exercises its business judgment and refuses to bring the action because of its belief that it is not in the best interests of the corporation.⁸⁸ This principle has been applied in the taxpayer context. In *Silver v. Watson*,⁸⁹ the court stated:

A taxpayer may not bring an action on behalf of a public agency unless the governing body has a duty to act, and has refused to do so. If the governing body has discretion in the matter, the taxpayer may not interfere.⁹⁰

The *Silver* decision, although logically extending the *Osburn* court's shareholder's derivative action analogy, is unsound in the context of the taxpayer's action. If the government has refused to act because the costs of pursuing such an action outweigh any possible monetary benefits to be derived from the action, what possible justification exists to prevent the public-minded citizen from recovering for the public treasury public funds illegally expended? Rather than interfering with the proper functioning of government, such actions promote the goal of controlling illegal governmental conduct.

Some question is cast on the *Silver* rationale by the California Supreme Court's recent pronouncements in *Stanson v. Mott*.⁹¹ The court upheld the right of a taxpayer to maintain an action on behalf of the

governmental action to recover illegally expended funds. The joinder requirement facilitates governmental participation in the action.

88. *Findley v. Garrett*, 109 Cal. App. 2d 166, 174, 240 P.2d 421, 426 (1952); *Fornaseri v. Cosmosart Realty & Bldg. Corp.*, 96 Cal. App. 549, 557, 274 P. 597, 600 (1929).

89. 26 Cal. App. 3d 905, 103 Cal. Rptr. 576 (1972).

90. *Id.* at 909, 103 Cal. Rptr. at 579. See *Elliott v. Superior Court*, 180 Cal. App. 2d 894, 897, 5 Cal. Rptr. 116, 118 (1960).

It has often been stated that "[a] taxpayer may sue a governmental body in a representative capacity in cases involving fraud, collusion, ultra vires, or failure on the part of the governmental body to perform a duty specifically enjoined." *Gogerty v. Coachella Valley Junior College Dist.*, 57 Cal. 2d 727, 730, 371 P.2d 582, 584, 21 Cal. Rptr. 806, 808 (1962). See also *Silver v. City of Los Angeles*, 57 Cal. 2d 39, 40-41, 366 P.2d 651, 652, 17 Cal. Rptr. 379, 380 (1961). According to the California Supreme Court,

[t]his well-established rule ensures that the California courts, by entertaining only those taxpayers' suits that seek to measure governmental performance against a legal standard, do not trespass into the domain of legislative or executive discretion. *Harman v. City & County of San Francisco*, 7 Cal. 3d 150, 160-61, 496 P.2d 1248, 1255, 101 Cal. Rptr. 880, 887 (1972).

91. 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976). See note 87 *supra*.

public treasury to recover tax funds illegally expended. Of particular interest here is the fact that the court's opinion does not indicate that the taxpayer made demand on any governmental body or official to commence the action or that such demand was refused. Whether or not this fact will take on judicial significance remains to be seen.

While *Stanson* leaves unclear the circumstances under which a taxpayer may commence suit, the court clearly articulated the test to be used to ascertain whether or not a public official is personally liable for illegally expended funds. Prior to the *Stanson* decision, strict liability was imposed on the official who erroneously expended public funds.⁹² This position was based "in large part on the assumption that the limits of authorized public expenditures are always clearly ascertainable and thus that there could be no excuse for a public official innocently to exceed such boundaries."⁹³ The *Stanson* court rejected this assumption and held that a public official is "subject to personal liability for improper expenditures made in the absence of . . . due care."⁹⁴ That standard, while ensuring sufficient latitude for the proper exercise of governmental powers, encourages public officials to confine their activities to the scope of their authority lest they be personally liable to the public for funds illegally expended.

IV. ATTORNEYS' FEES

The prohibitive cost of litigating taxpayers' suits⁹⁵ poses an awesome obstacle to any potential plaintiff contemplating a public interest law-

92. See *Mines v. Del Valle*, 201 Cal. 273, 257 P. 530 (1927).

93. 17 Cal. 3d at 223, 551 P.2d at 13, 130 Cal. at 709.

94. *Id.* at 227, 551 P.2d at 15, 130 Cal. Rptr. at 711 (footnote omitted). The court indicated that

[n]umerous considerations may be relevant to the determination of whether a public official has acted with due care or not. For example, a court may consider whether the expenditure's impropriety was obvious or not, whether the official was alerted to the possible invalidity of the expenditure, or whether the official relied upon legal advice or on the presumed validity of an existing legislative enactment or judicial decision in making the expenditure.

Id. at 227, 551 P.2d at 15-16, 130 Cal. Rptr. at 711-12 (citations omitted). The court did not comment on the appropriate test in the situation "in which a public official, or his family or friends, has personally benefitted from an unauthorized expenditure of public funds . . ." *Id.* at 227 n.12, 551 P.2d at 15 n.13, 130 Cal. Rptr. at 711 n.13 (footnotes misnumbered in unofficial reporters).

95. See *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 & n.10 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974); King & Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27, 29-31 (1973) [hereinafter cited as King & Plater]; Nussbaum, *supra* note 1, at 305-11; Witt, *After Alyeska: Can the Contender Survive?*, JURIS DOCTOR, Oct., 1975, at 34 [hereinafter cited as Witt]; Note, *A Setback for Environmental and Other Public*

suit.⁹⁶ This problem is particularly acute where the complexity of the legal and factual issues consumes much time and experienced effort and where the relief sought is injunctive rather than remunerative.⁹⁷ The staggering costs incident to litigating these kinds of taxpayers' suits have the effect of deterring many a responsible representative of the public from commencing legal actions, the benefits of which accrue primarily to the public's interest. Ironically, this is often the case despite the fact that the more modern trend has been to encourage such representatives "to sue, particularly where governmental entities are involved as defendants [since] only private citizens can be expected to 'guard the guardians.'"⁹⁸ To the extent that the public interest litigant is absolutely barred from any remuneration for the reasonable counsel fees expended, those litigants will be deprived of the opportunity to provide a needed public service which quite often only they can furnish.⁹⁹ Accordingly, the viability of taxpayers' actions to check governmental abuses will be undermined proportionately.

Generally speaking, the traditional American rule¹⁰⁰ has been that

Interest Plaintiffs, 55 NEB. L. REV. 283, 292-93 (1976) [hereinafter cited as *A Setback*].

96. For a general discussion of attorneys' fees in private interest litigation, see Nussbaum, *supra* note 1; Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733 (1973) [hereinafter cited as *Private Attorney General*]; Note, *A Giant Step Backwards: Alyeska Pipeline Service Co. v. Wilderness Society and Its Effect on Public Interest Litigation*, 35 MD. L. REV. 675, 692-96 (1976) [hereinafter cited as *Alyeska and Public Interest Litigation*]; Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316 (1971); Comment, *Court Awarded Attorney's Fees And Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974) [hereinafter cited as *Attorney's Fees*].

97. As Judge Peckham observed in *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974):

In many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder, at the thought of "taking on" an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered.

Id. at 101. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968); *King & Plater*, *supra* note 95, at 29; Nussbaum, *supra* note 1, at 303; *Alyeska & Public Interest Litigation*, *supra* note 96, at 693; *Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., at 787 (1973).

98. 57 F.R.D. at 100-01.

99. See *id.*; *Alyeska and Public Interest Litigation*, *supra* note 96, at 694.

100. For an historical discussion, analysis, and application of the rule, see *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 270-71 (1975); *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 126-31 (1974); *Flanders v. Tweed*, 82 U.S. (15 Wall.) 450 (1872); *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211 (1872); *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796); *Falcon, Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 MD. L. REV. 379 (1973); *King & Plater*, *supra* note 95, at 31-37; Nussbaum, *supra* note 1, at 311-14;

"attorneys' fees are not ordinarily recoverable without statutory or contractual authorization."¹⁰¹ The no-fee rule, however, has been sharply criticized for more than a half century.¹⁰² Notwithstanding the American rule, courts are empowered to award attorneys' fees under the auspices of their equitable powers.¹⁰³ Exercising such equitable powers, both federal and state courts have fashioned several exceptions¹⁰⁴ to the traditional rule.

Under the obdurate behavior exception, the "courts use their equitable powers to impose [attorneys'] costs on defendants who behaved in bad faith."¹⁰⁵ While this exception operates primarily against those who abuse the legal process, some courts have invoked the obdurate behavior doctrine in a more "outward-looking" manner and in so doing have shifted the focus "away from the culpability of the party litigants qua litigants to consider also the relevance of defendants' extrajudicial conduct in the extended public interest context."¹⁰⁶ To a certain extent, this exception can be of value to the successful taxpayer litigant attempting to recoup reasonable attorneys' fees.

Another general exception applies in the "common fund" situation. "Here the courts use their equitable powers to insure that the benefi-

Comment, *After Alyeska: Will Public Interest Litigation Survive?*, 16 SANTA CLARA LAW. 267, 268-71 (1976) [hereinafter cited as *After Alyeska*]; *Attorney's Fees*, *supra* note 96.

101. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). For the California adoption of this rule, see section 1021 of the California Code of Civil Procedure, quoted note 129 *infra*. A recently enacted statutory exception to this rule now allows the "prevailing plaintiff" in certain civil rights actions to recover attorneys' fees. 42 U.S.C.A. § 1988 (Supp. IV, 1976).

102. *See Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 270 & n.45 (1975); Goodhart, *Costs*, 38 YALE L.J. 849 (1929); *First Report of the Judicial Council of Massachusetts*, 11 MASS. L.Q. 7 (1925).

103. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939). *See Hall v. Cole*, 412 U.S. 1, 4-9 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392-93 (1970); *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962); *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233, 240-46 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930).

104. Consider those listed in *King & Plater*, *supra* note 95, at 39; *After Alyeska*, *supra* note 100, at 272-77.

105. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 96 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). *See F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116 (1974); *Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974); *City Bank v. Rivera Davila*, 438 F.2d 1367 (1st Cir. 1971); 6 J. MOORE, *FEDERAL PRACTICE* ¶ 54.77(2) (1976); Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953).

106. *King & Plater*, *supra* note 95, at 42. *See Bell v. School Bd.*, 321 F.2d 494, 500 (4th Cir. 1963) (en banc); *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 481 (4th Cir. 1951); cases cited in *King & Plater*, *supra* note 95, at 43 nn.82 & 83.

ciaries of litigation are the ones who share the expense."¹⁰⁷ In much the same way as the obdurate behavior exception has been expanded, the common fund exception has been significantly broadened to permit a plaintiff's recovery of attorneys' fees where a "substantial benefit" is passed on to an advantaged class even though the suit could never "produce a monetary recovery from which the fees could be paid."¹⁰⁸ Similarly, where an action for injunctive relief renders a "substantial service" to a benefited class by protecting the latter's constitutional rights, the successful litigant will be entitled to an award of attorneys' fees.¹⁰⁹ "[N]othing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses"¹¹⁰ under the substantial benefit rule.

These exceptions have been held to apply with equal force even where there exists no statutory provision for fee-shifting.¹¹¹ The general tenor of these doctrines strongly indicates that the prevailing plaintiff litigant should recoup attorneys' fees in all those "situations in which overriding considerations indicate the need for such recovery."¹¹² Here again, the common benefit doctrine can be of great value to the public interest litigant if a court decides to apply the doctrine broadly.

The more recent trend is toward a "private attorney general" exception which permits courts to "use their power offensively when necessary and appropriate to insure the effectuation of . . . [important public policies]."¹¹³ The private attorney general exception has in principle

107. 57 F.R.D. at 96. See *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939); *Central R.R. & Banking Co. v. Petturs*, 113 U.S. 116, 127 (1885); *Trustees v. Greenough*, 105 U.S. 527, 532 (1881); *King & Plater*, *supra* note 95, at 43-47; *Nussbaum*, *supra* note 1, at 314-15; *Alyeska and Public Interest Litigation*, *supra* note 96, at 683-86.

108. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970). See *King & Plater*, *supra* note 95, 46-47; *Nussbaum*, *supra* note 1, at 315-16; Comment, *Attorney's Fees Under the Landrum-Griffin Act: The Need for "Union Therapeutics,"* 7 LOY. L.A.L. REV. 137, 151-53 (1974) [hereinafter cited as *Union Therapeutics*]; *Alyeska and Public Interest Litigation*, *supra* note 96, at 685.

109. *Hall v. Cole*, 412 U.S. 1, 8 (1973). See *King & Plater*, *supra* note 95, at 47; *Alyeska and Public Interest Litigation*, *supra* note 96, at 685-86. A good discussion of the *Hall* case can be found in *Union Therapeutics*, *supra* note 108, at 153-59.

110. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970).

111. See *Hall v. Cole*, 412 U.S. 1 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). See also *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 275-78 (1975) (Marshall, J., dissenting).

112. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970) (footnote omitted); accord, *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 798-19 (1967).

113. 57 F.R.D. at 96, 101. See *Fairley v. Patterson*, 493 F.2d 598, 604-06 (5th Cir. 1974); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971);

blossomed from the obdurate behavior and common benefit exceptions.¹¹⁴ While some distinctions can be made between the private attorney general exception and other exceptions, one commentator has persuasively concluded:

[I]t is difficult to identify any principle that would distinguish, as a matter of equitable power, the private attorney general rationale from the common benefit and bad faith theories.¹¹⁵

The similarity between the operative logic of the common benefit exception and the private attorney general exception renders it almost impossible to discern a viable difference between the underlying rationales of the two theories:

Although common benefit fee awards developed as a means of preventing unjust enrichment, the Court's most recent common benefit cases . . . blurred the distinction between the benefit theory and the private attorney general rationale by finding a common benefit in mere vindication of congressional policy.¹¹⁶

Likewise, with the obdurate behavior exception cases it has been pointed out:

[I]n terms of judicial power, there appears to be no clear distinction between a bad faith award based on violation of a clear and established right, and a private attorney general award based on violation of an important right.¹¹⁷

Yet, despite these important similarities and the expansion of the obdurate behavior and common benefit doctrines to include a more

Calnetics Corp. v. Volkswagen of America, Inc., 353 F. Supp. 1219, 1224-25 (C.D. Cal. 1973); *Sims v. Amos*, 340 F. Supp. 691, 693-95 (M.D. Ala. 1972), *aff'd*, 409 U.S. 942 (1972); *Attorney's Fees*, *supra* note 96, at 655-81. *But see* *Bradley v. School Bd.*, 472 F.2d 318, 327-31 (4th Cir. 1972), *rev'd on other grounds*, 416 U.S. 696 (1974). A general discussion of many of the federal cases is presented in King & Plater, *supra* note 95, at 50-56; Nussbaum, *supra* note 1, at 321-31; *Private Attorney General*, *supra* note 96, at 748-55.

In some jurisdictions, however, successful taxpayer litigants have been permitted to secure counsel fee costs for quite some time. *See Pensioners Protective Ass'n v. Davis*, 150 P.2d 974 (Colo. 1944); *Kimble v. Board of Comm'rs*, 66 N.E. 1023 (Ind. App. 1903); *Frost v. Inhabitants of Belmont*, 88 Mass. (6 Allen) 152 (1863); *Allen v. City of Omaha*, 286 N.W. 916 (Neb. 1939); *Horner v. Chamber of Commerce*, 72 S.E.2d 21 (N.C. 1952); *State ex rel. Bonner v. Andrews*, 175 S.W. 563 (Tenn. 1915).

114. *See* King & Plater, *supra* note 95, at 43; Nussbaum, *supra* note 1, at 318; *After Ayleska*, *supra* note 100, at 276; *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 170, 175-76 (1975) [hereinafter cited as *1974 Term*]. More importantly, in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), the Court invoked the significant benefit rationale in a private attorney general context. *Id.* at 402.

115. *1974 Term*, *supra* note 114, at 175-76.

116. *Id.* at 176 (footnotes omitted).

117. *Id.* (footnotes omitted).

outward-reaching private attorney general exception,¹¹⁸ and despite the "therapeutic" nature of the substantial benefit cases,¹¹⁹ the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*¹²⁰ refused to acknowledge a private attorney general exception to the traditional American rule.¹²¹ While declining to assess the "merits or demerits" of the American rule,¹²² the Court posited several statutory,¹²³ equitable,¹²⁴ and policy arguments¹²⁵ to support its holding. Notwithstanding those arguments, the *Alyeska* decision has come under heavy fire from both a well reasoned dissent¹²⁶ and nearly every commentator who has reviewed the case.¹²⁷ However, in light of

118. See note 114 *supra*.

119. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970).

120. 421 U.S. 240 (1975).

121. *Id.* at 271 & n.45.

122. *Id.* at 270.

123. *Id.* at 251-57.

124. *Id.* at 245-50, 259-70 & nn.44 & 46.

125. *Id.* at 264 & n.39, 265, 269.

126. *Id.* at 272 (Marshall, J., dissenting).

Statutory analysis: The majority opinion urged that an 1853 court-costs statute and its subsequent amendments deprived the Court of any jurisdiction to award attorneys' fees in private attorney general suits. *Id.* at 247-69. However, the Court never articulated any reason for applying these statutes to private attorney cases while not applying the statutes in obdurate behavior and common benefit cases. See 1974 *Term, supra* note 114, at 175 n.38. Moreover, the dissent in *Alyeska* correctly refers to several of the Court's prior holdings which plainly established that the various court-cost statutes pose no bar to the general equitable power of courts to award counsel fees. 421 U.S. at 278-81, *citing* *Trustees v. Greenough*, 105 U.S. 527, 535-36 (1882); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 & n.11 (1967). See *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164, 166 (1939). In short, the majority's contention in *Alyeska* "will not withstand even the most casual reading of the precedents." 421 U.S. at 282.

Equity jurisdiction: The *Alyeska* opinion can be understood to say that counsel fees have traditionally been a matter of statutory allowance or construction. *Id.* at 251-57, 260-63. Yet as Justice Marshall's dissent clearly demonstrates, the Court has always enjoyed an independent equitable power to award counsel fees. *Id.* at 274-75, *citing* *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164, 166 (1939). See *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970). These cases and others, see 421 U.S. at 275-77, "plainly establish an independent basis for equity courts to grant attorneys' fees under the several rather generous rubrics." *Id.* at 277.

Manageability and policy considerations: Justice Marshall aptly noted that formulation of practical guidelines in the private attorney general context need not prove any more difficult than in other areas where the Court has fashioned similar relief. *Id.* at 282-84. Even assuming arguendo any shortcomings in his three prong test, *id.* at 285, the fact remains that guidelines of a similar nature could be formulated in order to secure a reasonable attorney cost recovery for the public interest litigant. See, e.g., 1974 *Term, supra* note 114, at 180-82; *A Setback, supra* note 95, at 294-98.

127. See Witt, *supra* note 95; 1974 *Term, supra* note 114; Comment, *Alyeska Pipeline*

the *Alyeska* holding, a taxpayer litigant can only recover counsel costs in those limited instances where a court would be willing to expand the obdurate behavior or common benefit exceptions.

Whatever the impact of *Alyeska* on the federal judiciary, California courts have never hesitated to exercise their own independent judgment as to whether or not restrictive holdings of the federal courts should be followed.¹²⁸ And even though California has adopted the American rule by statutory provision,¹²⁹ state courts have exercised their equitable powers to permit fee-shifting. Furthermore, the accepted practice has long been to construe liberally those public interest statutes which provide for attorneys' fees.¹³⁰ To award counsel costs in taxpayers' suits seems consistent with the state policy of encouraging public interest litigation.¹³¹

Following the pre-*Alyeska* position of the United States Supreme Court,¹³² California courts have granted counsel fees to a successful plaintiff litigant who renders a "substantial benefit" to a particular class even in the absence of a monetary award or common fund.¹³³ In *D'Amico v. Board of Medical Examiners*,¹³⁴ the state supreme court declined an opportunity to rule on the applicability of the obdurate

Serv. Co. v. Wilderness Society: Demise of the "Private Attorney General," 6 ENVIR. L. 243 (1975); *After Alyeska*, *supra* note 100; *Alyeska and Public Interest Litigation*, *supra* note 96; *A Setback*, *supra* note 95; 1975 BRIGHAM YOUNG U.L. REV. 777; 42 BROOKLYN L. REV. 351 (1975); 44 U. CINN. L. REV. 873 (1975); 51 WASH. L. REV. 1047 (1976).

128. See, e.g., authorities cited in Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977).

129. Section 1021 of the California Code of Civil Procedure provides:

Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided.

CAL. CODE CIV. PRO. § 1021 (West 1967).

130. See, e.g., *Morgan v. Reasor Corp.*, 69 Cal. 2d 881, 896-97, 447 P.2d 638, 648-49, 73 Cal. Rptr. 398, 408-09 (1968); *Silberman v. Swoap*, 50 Cal. App. 3d 568, 570, 123 Cal. Rptr. 456, 458 (1975); *accord*, *Trout v. Carleson*, 37 Cal. App. 3d 337, 112 Cal. Rptr. 282 (1974).

131. See *People v. Superior Court*, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973); *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

132. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939).

133. *Mandel v. Hodges*, 54 Cal. App. 3d 596, 620-23, 127 Cal. Rptr. 244, 260-62 (1976); *Fletcher v. A.J. Indus., Inc.*, 266 Cal. App. 2d 313, 323-25, 72 Cal. Rptr. 146, 152-53 (1968). Since the substantial benefit exception is but an extension of the common fund doctrine, the latter has a fortiori been accepted by the California courts. See authorities cited *id.* at 323, 72 Cal. Rptr. at 152.

134. 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974).

behavior and private attorney general exceptions in California.¹³⁵ Nevertheless, two substantial benefit cases have gone a long way in at least adopting the rationale of the private attorney general exception. *Knoff v. City & County of San Francisco*¹³⁶ provides a good illustration. The case involved a taxpayers' suit seeking a writ of mandate to correct certain property tax assessment policies.¹³⁷ The broad outward-reaching effect of the relief sought, the absence of any actual monetary fund, and the public nature of the benefit conferred, all render the case practically indistinguishable from a private attorney general suit. Notwithstanding these factors, the *Knoff* court, without addressing the latter exception, found that enough significant benefit was received by taxpayers generally to permit the court to exercise its plenary equitable powers.¹³⁸

The case of *Mandel v. Hodges*¹³⁹ is perhaps even more difficult to limit to the substantial benefit doctrine. *Mandel* was an action to enjoin the governor from ordering the closure of state offices on Good Friday between the hours of noon and 3:00 p.m.¹⁴⁰ The substantial benefit rendered by the plaintiff was, in the words of the court, "to the citizens and taxpayers of th[e] state."¹⁴¹ The public policy effectuated was the preservation of public funds in compliance with the establishment clause of the first amendment and the California Constitution.¹⁴² Consequently, the *Mandel* court's reservation about applying the private attorney general exception¹⁴³ proves to be conceptually inconsistent with its liberal application of the substantial benefit doctrine¹⁴⁴ in view of the fact that all of the elements of a private attorney general exception were present in *Mandel*. First, the "important right being protected" was one actually "shared by the general public" and effectuated a strong

135. *Id.* at 26-27, 520 P.2d at 28-29, 112 Cal. Rptr. at 804-05; *accord*, *Bozung v. Local Agency Formation Comm'n*, 13 Cal. 3d 483, 485, 531 P.2d 783, 784, 119 Cal. Rptr. 215, 216 (1975); *Douglas v. Los Angeles Herald Examiner*, 50 Cal. App. 3d 449, 468-69, 123 Cal. Rptr. 683, 695 (1975). Resolution of these issues is currently pending before the California Supreme Court in the case of *Serrano v. Priest*, No. 30398 (Cal. 1975). Although the court decided the substantive issues in the *Serrano* case on December 30, 1976, the court has postponed decision on the question of attorneys' fees.

136. 1 Cal. App. 3d 184, 81 Cal. Rptr. 683 (1969).

137. *Id.* at 190-93, 81 Cal. Rptr. at 686-88.

138. *Id.* at 203-04, 81 Cal. Rptr. at 695-96.

139. 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976).

140. *Id.* at 601-02, 127 Cal. Rptr. at 247.

141. *Id.* at 623, 127 Cal. Rptr. at 261 (emphasis added).

142. *Id.* at 619, 623, 127 Cal. Rptr. at 259, 261.

143. *Id.* at 620, 127 Cal. Rptr. at 259-60.

144. *Id.* at 621-23, 127 Cal. Rptr. at 260-62.

public policy. Second, the absence of the plaintiff's pecuniary interest in the outcome along with the financial burden of private enforcement were "such as to make the award essential." Third, the shifting of the costs in *Mandel* effectively placed the burden on the class that actually benefited from the litigation.¹⁴⁵ Finally, the class of beneficiaries in *Mandel* was not "small in number and easily identifiable;" the general benefits received were not capable of being "traced with some accuracy;" and the costs of the case were not capable of being "shifted with some exactitude to those benefiting."¹⁴⁶ By the court's own admission,¹⁴⁷ "the purported benefits accrue[d] to the general public."¹⁴⁸ The *Mandel* decision thereby blurred whatever distinction might have existed between the common benefit and private attorney general cases.¹⁴⁹

Although the California authorities in this area are not well developed, extended applications of the common benefit and obdurate behavior doctrines do provide some measure of hope for the recovery of counsel costs by public interest litigants. However, it must be conceded that such applications are generous ones. When the taxpayer litigant files a bona fide suit, he or she has no real assurance that the public at large will repay the litigant, by awarding reasonable attorneys' fees, for the benefit the public has received.¹⁵⁰ That is the reason that the recoupment of such fees must be grounded in a broad private attorney general exception. The costs of many of these lawsuits are simply too great for many a litigant to bear even if it means that an important liberty or right may have to be forfeited. "Therefore, if public interest litigation is to survive, except perhaps as an avocation of the wealthy, it must be subsidized."¹⁵¹ For the present purposes such subsidization

145. These tests are adopted from Justice Marshall's dissent in *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 284-85 (1975), and Judge Peckham's majority opinion in *La Raza Unida v. Volpe*, 57 F.R.D. 94, 98, 101 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). See *A Setback*, *supra* note 95, at 296-98.

146. The references quoted in the text were offered by the *Alyeska* court as several of the characteristic elements of the common benefit cases as distinguished from the private attorney general class of decisions. 421 U.S. at 264-65 n.39.

147. See text accompanying note 141 *supra*.

148. 421 U.S. at 265 n.39.

149. See text accompanying note 115 *supra*. An equally broad extension of the common benefit theory was invoked by the court in *Weiss v. Bruno*, 523 P.2d 915, 916-17 (Wash. 1974). See *Public Util. Dist. No. 1 v. Kotsick*, 545 P.2d 1, 4 (Wash. 1976).

150. In this respect, one commentator has cogently noted:

It is particularly unreasonable to deny fees to a plaintiff who is, in effect, enforcing government policy by bringing a lawsuit to require compliance with a statute or the Constitution. Without some provision for fee-shifting in such cases, the law frequently confers a paper right only.

After *Alyeska*, *supra* note 100, at 289 (footnote omitted). See *id.* at 289-90 n.143.

151. *Id.* at 288.

can be made possible by awarding attorneys' fees to the successful public interest litigant. In the absence of statutory provision, determination of the propriety of granting an award of counsel fees along with the establishment of guidelines for establishing the reasonableness of such fees can be equitably conducted by a trial court.¹⁵² Given the present state of the law, any refusal to reimburse the taxpayer litigant for the reasonable costs expended would result in an injustice to the successful plaintiff and, ultimately, to the general public as well.

V. CONCLUSION

The taxpayer litigant is in many ways the contemporary counterpart of the Socratic gadfly. In a very real sense, the success or failure of modern democratic government depends in part on the existence of such public-minded citizens. As public guardians they help ensure that the rule of law will be preserved. However much our laws encourage their efforts, the task of safe-keeping the general welfare will always be a formidable one. "The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the courtroom."¹⁵³ The time, effort, and potential expense of public interest litigation all render it particularly unappealing to the fanciful dabbler in social causes. On the other hand, legal barriers in areas such as standing, remedial relief, and attorneys' fees may create a wall too high for even the public-minded to scale. As this article has attempted to demonstrate, the laws in California are conducive to furthering the ends of public interest litigation. Accordingly, our state laws should continue to encourage social input from the public interest litigant so that once litigated the best interests of the public may prevail.

152. See *id.* at 290; 1974 Term, *supra* note 114, at 177-82; *A Setback*, *supra* note 95, at 292-98.

153. Scott, *Standing In the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 674 (1973).